GARDEN CITY DEVELOPMENT BHD.

v.

COLLECTOR OF LAND REVENUE, FEDERAL TERRITORY

PRIVY COUNCIL
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
SEBAG SHAW
[PC APPEAL NO. 6 OF 1980]
26 MAY 1982

LAND LAW: *Land use - Town land held under Registry Title - Conditions of land use - Proper effect - Land not to be used for agricultural or industrial purposes - Use of land for building purposes - Whether prohibited by necessary implication - Whether required proper conversion of category of land use - Sections 53(1), (2), (3) of National Land Code 1965 - Interpretation - Time for appeal - Whether lapsed - National Land Code 1965, ss. 53, 116, 418.*

The appellants were the proprietors of a parcel of land in Kuala Lumpur upon which they had erected a building known as Wisma Central. The said land, which formed part of a larger area of land, was alienated in 1886 by way of a lease in perpetuity. The facts showed that on the first page of the lease document was written the words "Lease for Agricultural Land". This apart, the lease was also made subject to 9 conditions and condition 5 states "the Government may take, or grant licences for taking, any timber or other natural produce upon this land".

The appellants, in erecting the Wisma Central, apparently, had not applied for conversion of land use from "agriculture" to "building". This being the case, the appellant was served with a notice under s. 128 National Land Code (NLC) wherefore the appellants were required to remedy the alleged breach of condition of land use, failing which the land would be forfeited. The appellants applied for an order that the respondent cancel the notice on the ground that it was bad and invalid. *Inter alia*, the appellants argued that there was no necessity for them to apply for conversion as there was no expressed endorsement on the document of title pertaining to category of land use. The application was allowed by the High Court. The Federal Court however reversed the decision on appeal holding that (i) section 53 of the NLC, upon its proper reading, prohibited the appellants' land from being used for building purposes (ii) the appellants were duty bound in law to apply for conversion of the land use from "agriculture" to "building" (iii) the failure to apply for conversion of the land constituted a breach of the conditions of land use, and this justified an action under the said s. 128. This is the appellants' appeal.

Held:
Per Lord Keith of Kinkel

[1] The presence of the words "Lease for Agricultural Land" on the lease document cannot in itself have the effect of imposing a condition of use for agriculture only. The words may have been intended to be a description of the lease, but whether or not it is an accurate description can only be ascertained by examining the conditions contained in the body of the lease.

[2] There is no merit in the argument that condition 5 was inconsistent with the use of the land for anything but agricultural purposes. There is just no necessary inconsistency. There is no evidence as to whether or not there was any timber on the land. What is intended to be covered by "other natural produce" is obscure, but plainly the grantee of the lease cannot be under any obligation to allow the land to remain in a state capable of bearing natural produce, as this would derogate from the grant to the effect of preventing him making any beneficial use whatever of it. In the circumstances it is not possible to infer an intention to restrict the use of the land to agriculture.

[3] In the circumstances herein, s. 53(1) of the NLC which states "This section applies to all land alienated before the commencement of this Act other than land which, immediately before that commencement, is subject to an express condition requiring its use for a particular purpose" applies to the appellants' land.

[4] The appellants' land is town land held under the registry title. It is not land held under the Land Office title. This being the case, s. 53(2) which stipulates "...country land or town or village land held under Land Office title shall become subject ... to an implied condition that it shall be used for agricultural purposes only" does not affect the appellants' land.

[4a] Bearing in mind the aforesaid, it follows that s. 53(3) does affect the appellants' land. This provision clearly prevents the appellants' land from being lawfully used for agricultural or industrial purposes.

[4b] The fact that s. 53(3) prevented the appellants' land from being used for agricultural or industrial purposes, does not necessarily imply that it also precludes the lawful use of the land for the erection of a building such as Wisma Central. A contrary argument would be wholly unsound, as it seeks to derive from the provisos to the main enactment of the subsection an inference enlarging the scope of that enactment, so that the implied condition thereby imposed would prohibit not only use for agriculture or industry but the erection of buildings generally. No such inference can properly be drawn.

[Appeal allowed. Order of High Court directing cancellation of s. 128 notice restored.]

Legislation referred to:
National Land Code 1965, ss. 53, (1), (2), (3), 110, 124, 127(1), 128(1), 418, (1), (3)

For the appellant - David Widdicombe QC (Dato Kok Wee Kiat with him); M/s Macfarlanes
For the respondent - Donald Rattee QC (Robert Ham with him); M/s Stephenson Harwood

JUDGMENT

Lord Keith of Kinkel:

This appeal comes before the board from an order of the Federal Court of Malaysia dated 14 December 1978. By that order the Court (Lee Hun Hoe CJ Borneo, Wan Suleiman FJ and Chang Min Tat FJ) reversed a judgment of Harun J, in the High Court in Malaysia, allowing an appeal by the present appellants, under s. 418 of the National Land Code, Act 56 of 1965 ("the Code"), against a notice dated 12 July 1976, issued to them by the respondent under s. 128 of the Code.

The history of events leading to the appeal is fully set out in the judgments of the Courts below, and, as little of it; is relevant to the issues which now require to be determined, their Lordships find it unnecessary to recapitulate.

The appellants are proprietors of a site in the city of Kuala Lumpur, within the Federal Territory, upon which they have erected a substantial shopping-cum-office complex, known as Wisma Central. The respondent issued the notice complained of upon the basis that the land forming the site had thereby become liable to forfeiture.

Subsection (1) of s. 128 provides:

> 128(1) Where:
>
> (a) any alienated land is liable under s. 127 to forfeiture to the State Authority for breach of any condition, and;
>
> (b) it appears to the Collector that the breach is capable of being remedied by the proprietor within a reasonable time,
>
> the Collector shall serve, or cause to be served, on the proprietor a notice in Form 7A specifying the action required for remedying the breach, and calling upon him to take such action within the time therein specified.

Section 127(1) provides:

> 127(1) Upon any breach arising of any condition to which any alienated land is for the time being subject:
>
> (a) the land shall become liable to forfeiture to the State Authority, and
>
> (b) except in a case where action for the purpose of causing the breach to be remedied is first required to be taken under s. 128, the Collector shall proceed with the enforcement of the forfeiture in accordance with the provisions of s. 129.

It is to be observed that in relation to the Federal Territory the State Authority is now the Land Executive Committee of the Territory.

The main issue in the appeal is whether the appellants are in breach of a condition to which the land forming the site of Wisma Central is subject, so as to attract the forfeiture provisions of s. 127, failing remedy of the breach. Section 110 of the Code provides, *inter alia*, by para. (a) that land alienated before the commencement of the Act shall be subject to "such express conditions and restrictions in interest (if any) as, immediately before that commencement, were endorsed on the document of title thereto (or, in the case of a certificate of title, referred to therein)". The site in question, which extends to some 2 acres, forms part of a larger area of land, about 100 acres in extent, which was originally alienated by a lease in perpetuity dated 20 July 1886, granted by the Sultan of Selangor in favour of one H.C. Syers. That land went through various subdivisions, and the certificate of title (No. 3443) under which the appellants hold their plot was first issued on 8 August 1909. It is a registry title, as the Federal Court held and the respondent does not now dispute, and it describes the land as situated in the town of Kuala Lumpur. The evidence is that for many years a substantial dwelling house occupied part of the land, until demolished to make way for Wisma Central. It is common ground that the appellants hold subject to the conditions contained in the lease of 1886, and the first question to be determined is whether, as the respondent contends and the appellants deny, these conditions properly construed have the effect that the land is required to be used for agricultural purposes only. It is not in dispute that, if the answer to that question is in the affirmative, the appellants committed a breach of the condition by erecting Wisma Central on the land.

At the top of the first page of the 1886 lease there appear, in capital letters, the words "Lease for Agricultural Land". They give the impression of having been imprinted by rubber stamp, applied somewhat unevenly. The nature of the printing is different from that contained in

the body of the lease, and there is nothing to indicate whether it was applied before or after the lease was executed. Their Lordships are of opinion that in the circumstances the presence of these words cannot in itself have the effect of imposing a condition of use for agriculture only. They may have been intended to be a description of the lease, but whether or not it is an accurate description can only be ascertained by examining the conditions contained in the body of the lease. There are nine such conditions, and none of them makes any specific reference to agriculture or agricultural use. Counsel for the respondent founded strongly on condition 5 as leading by necessary implication to the conclusion that the use of the land was restricted to agriculture.

> That the Government may take, or grant licences for taking, any timber or other natural produce upon this land.

This condition was claimed to be inconsistent with the use of the land for anything but agricultural purposes. In their Lordships' opinion there is no necessary inconsistency. There is no evidence as to whether or not there was ever any timber on the land. What is intended to be covered by "other natural produce" is obscure, but plainly the grantee of the lease cannot be under any obligation to allow the land to remain in a state capable of bearing natural produce, as this would derogate from the grant to the effect of preventing him making any beneficial use whatever of it. In the circumstances it is not possible to infer an intention to restrict the use of the land to agriculture.

That disposes of the primary argument for the respondent. But there was advanced on his behalf a secondary argument, which found favour with the Federal Court, to the effect that, if the primary argument failed, then on a proper construction of certain provisions of the Code the land at present may not lawfully be used for the erection of a building such as Wisma Central.

The provisions in question are to be found in s. 53 of the Code. Section 53(1) is in these terms:

> This section applies to all land alienated before the commencement of this Act other than land which, immediately before that commencement, is subject to an express condition requiring its use for a particular purpose.

The primary argument for the respondent having failed, it follows that the section applies to the appellants' land.

Subsection (2) enacts that, subject to two provisos which it is unnecessary to set out:

> All land to which this section applies which is at the commencement of this Act:
>
> (a) country land, or
>
> (b) town or village land held under Land Office title,
>
> shall become subject at that commencement to an implied condition that it shall be used for agricultural purposes only.

This provision does not affect the appellants' land, since it is town land held under registry title, not Land Office title. It follows that subsection (3) does affect the appellants' land.

Subsection (3) is in these terms:

> All other land to which this section applies shall become subject at the commencement of this Act to an implied condition that it shall be used neither for agricultural nor for industrial purposes:

Provided that this condition:

(i) shall not prevent the continued use of any part of the land for any agricultural or industrial purpose for which it was lawfully used immediately before the commencement of this Act; and

(ii) shall not apply to any part of the land which is occupied by or in conjunction with:

(a) any building lawfully erected before that commencement or

(b) any building erected after that commencement, the erection of which would (under s. 116) be lawful if the land were subject instead to the category 'building'.

This provision clearly prevents the appellants' land being lawfully used for agricultural or industrial purposes. But the respondent argues that by implication it also precludes the lawful use of the land for the erection of a building such as Wisma Central. It is unnecessary, for the disposal of this argument, to enter upon an examination of the general scheme embodied in the Code in relation to the eventual allocation of all land into one or other of the three categories of land use "agriculture", "building" and "industry", and the procedures whereby this categorisation may take place in relation to any particular land. In their Lordships' opinion the argument is wholly unsound. It seeks to derive from the provisos to the main enactment of the subsection an inference enlarging the scope of that enactment so that the implied conditions thereby imposed would prohibit not only use for agriculture or industry but the erection of buildings generally. No such inference can properly be drawn. As a general rule, the purpose of a proviso is to relax to some extent the full rigour of the main enactment, and the provisos to s. 53(3) present no features indicating that they constitute an exception to the rule. The purpose of proviso (i) is clear. It is to preserve the lawfulness of use for agricultural or industrial purposes which was established before the Code came into force. As for proviso (ii), it does not yield up the whole of its meaning easily, and the word "instead" in para. (b) is particularly hard to construe. But para. (a) clearly exempts from the prohibition of agricultural and industrial use any building, or land ancillary thereto, erected before the commencement of the Act. In regard to para. (b), it is to be observed that s. 116 of the Code, which deals with the category of land use "building" and the implied conditions applicable to that category, contemplates by subsection (1)(b) that there may be exceptions to the general prohibition against the use of land in this category for agricultural or industrial purposes. The intention of para. (b) of proviso (ii) appears to be to provide similar exceptions for land to which s. 53(3) applies. There is therefore no good ground for reading into s. 53(3), by necessary implication, a general prohibition against use for building purposes.

The final argument of the respondent is that the appellants' appeal to the High Court was out of time. The appeal was made under s. 418(1) of the Code, which provides:

> 418(1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

The notice under s. 128 of the Code, of which the appellants complain, was issued on 12 July 1976. The originating motion which initiated the appeal is dated 11 October 1976. So if the relevant "decision" of the Collector was the s. 128 notice, the appeal was made within the statutory time limit. "Decision" is defined by s. 418(3) as including "any act, omission, refusal, direction or order". The s. 128 notice required the appellants to take certain action to remedy an alleged breach of a condition affecting the use of their land. It was clearly, therefore, within the definition as being a "direction". So much was accepted on behalf of

the respondent. But it was maintained that the relevant decision, against which the appellants ought to have appealed, was taken much earlier, namely on 17 February 1973. On that date the Collector then having responsibility, in response to an application by the appellants for subdivision of the land to enable part of it to be given off for road widening, sent to the appellants a letter in these terms:

> With reference to your application ... you have to apply under s. 124 National Land Code to alter the condition/impose an appropriate express condition on this land.

This letter was said to constitute a decision that the land was subject to an express condition that it was to be used for agricultural purposes only, which stood and was binding on the appellants unless timeously appealed against, which it had not been.

Their Lordships have no hesitation in rejecting this argument. The letter of 17 February 1973, is no more than an expression of opinion as to the legal position, and can in no sense be regarded as a formal decision under the Act. Even if it were, there is no good reason why, in dealing with an appeal against the s. 128 notice, the Court should be precluded from examining, so far as necessary for the disposal of that appeal, the validity of prior decisions forming the background to the issue of that notice. The notice required certain action to be taken by the appellants, and it very directly affected their rights inasmuch as failure to take such action was liable to lead to forfeiture of their land. A challenge to the validity of the notice was essential to the protection of their interests, which was not the position in regard to any earlier purported decision of the Collector or the Land Executive Committee, in particular the letter of 17 February 1973, or the letter of 17 February 1976, (alternatively founded on as being the relevant decision), requiring payment of a premium for placing the land in the building category under s. 124 of the Code. Their Lordships are accordingly of opinion that, in a timeous appeal against the s. 128 notice, the appellants were in a position to open up all matters upon which its validity depended, in particular the questions whether their land was subject to the condition of agricultural use only and whether on a proper construction of s. 53 use of it for building purposes was prohibited.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed, and that the order of the High Court directing the cancellation of the s. 128 notice should be restored. The respondent must pay the appellants' costs in the Federal Court and before this board.

Also found at [1982] CLJ 346